United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1253

To be argued by:
JOYCE KRUTICK BARLOW

76-1258

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United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
Respondent

against-

FRED STEINBERG and
DENNIS RIESE,
Defendants-Appellants

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT STEINBERG'S BRIEF

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UNITED STATES OF AMERICA,

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-against-

FRED STEINBERG and DENNIS RIESE,

Defendants-Appellants

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction after jury trial of the offense of unlawfully, willfully and knowingly, directly and indirectly, corruptly offering things of value to public officials of the Immigration and Naturalization Service of the Department of Justice, as well as conspiracy to commit the offense (Title 18, U.S.C. 371, 201(b), 201(b)2. Judgment was entered against the defendant on May 21, 1976. The trial in this matter commenced on March 21, 1976.

Both the defendant Steinberg and defendant Riese were sentenced under the Federal Youth Corrections Act, Title 18, U.S.C. Section 5005 et seq. Both defendants were found not to require commitment and were sentenced as young adult offenders pursuant to 18 U.S.C. 5010(a) as extended by 18 U.S.C. 4209.

QUESTIONS PRESENTED

1. Was the defendant Steinberg entitled to a directed verdict of acquittal in that as a matter of law he had been entrapped by the acts of government agents, and further the fact that the government had failed to establish beyond a reasonable doubt that the defendant had a propensity to commit the crime?

2. Was the charge upon the law as given to the jury improper in that it did not comply with the requirements set forth in U.S. v. BRAVER, 450 Fed. 2d 799?

3. Was the conduct of the government agents so outrageous as to result in deprivation of defendant Steinberg's right to due process of law?

4. Has the rule that a defendant who is not predisposed to commit a crime but who is induced and counseled into the commission of a crime by the words "an act of government agents" been changed by the recent ruling of HAMPTON v. U.S., 96 S.Ct. 1646?

5. Was it error for the trial court to allow into evidence, tape recordings of meetings and telephone conversations without proof of sealing of said tapes and proof as to the chain of possession from the time the tapes were prepared until the trial?

6. Did the misconduct of the prosecutor in his summation and rebuttal argument to the jury deprive defendant Steinberg of a fair trial and due process of law?

7. Did the failure of the trial court to extensively question each venireman during the voir dire, and the failure of the court to employ counsel's requests for voir dire violate the defendant's rights to a fair trial and thus deprive him of due process of law?

STATEMENT OF FACTS

The defendant-appellant Fred Steinberg was arrested on June 12, 1975 at the Commodore Hotel, in the City of New York. Arrested with him were Phanvika Tansuttivanich, Giovanni Pirina, Avinash Vashisht, Chayanon Vongchan, Mohammad Ansari and Phairoj Boonamnuaysuk.

The arrest was the culmination of a number of meetings and telephone calls among Mr. Steinberg, co-defendant Dennis Riese, and Immigration and Naturalization Service Agents Volpe and Moskowitz.

THE MEETINGS AND CONVERSATIONS

The first of these meetings occurred on March 19, 1975. Agent Volpe testified that he and other INS agents entered a Brew Burger restaurant located at 59th Street and Lexington Avenue at about 8 P.M. (TR 91,92) Agent Volpe spoke with the manager of the establishment, and during that conversation, the defendant-appellant Fred Steinberg arrived and identified himself as the night supervisor of all the Brew Burger restaurants. (TR 92,93)

According to Volpe, he had a conversation with his supervisor John Coffee upon returning to his office. (TR 103) Volpe, in his conversation with Coffee, claimed that the defendant Fred Steinberg

had told him he wanted to "work something out"[1a] (TR 103) Volpe claimed that Steinberg suggested he arrest only some of the help and leave most behind. (TR 103) Volpe also claimed that Steinberg had stated that the Lindsay administration had been bought and the police were taken care of. (TR 103) No written report was made of the alleged conversation between Steinberg and Volpe. (TR 489) Agent Volpe had previously testified that memos were 'written' when it became necessary to "cover" themselves on an incident. (TR 417)

On cross-examination, Agent Volpe admitted that in his conversation of March 19, 1975 with Steinberg, the defendant merely stated to the agent that the INS raids were interfering with business. He further asked whether something could be done so that his business wasn't badly affected. (TR 489) Volpe admitted that Fred had not offered him anything (TR 490) and further admitted that many other businessmen had made this same request, and that it was not unusual (TR 491, 492). Volpe also stated that at the close of this conversation he believed Steinberg was a decent, honest, young man (TR 489).

Upon direct examination, Volpe related that his supervisor Mr. Coffee advised him he would consult with the next supervisor in line. (TR 104) The following afternoon Volpe met with Mr. Rowland, the supervisor in charge of Volpe's section. (TR 104) From Mr. Rowland's

* * * *

1a. The agent did not explain what problem was to be worked out.

office, Mr. Rowland, Mr. Coffee, Volpe and his partner Moskowitz (who was not a party to the conversation with Steinberg) went to the office of Francis Johnson, Acting Assistant Director of Investigation (TR 105). There the agent again related the March 19 conversation. The agent was advised to "further investigate". (TR 105)

It should be noted that although this conversation of March 19 was allegedly related to the Acting Assistant Director of Investigations, it was never mentioned in the office memos prepared by the agents. (TR 497)

It should also be noted that at no time during this conversation did Mr. Steinberg suggest or allude to a payoff, nor did his conduct indicate this type of arrangement. (TR 493)

The next meeting between Steinberg and Volpe occurred on March 31, 1975 at the Brew Burger on 34th Street and Seventh Avenue.

Volpe testified that he identified himself to the manager and asked if they (the INS agents) could conduct an investigation. During this conversation Mr. Steinberg entered. Thereafter Volpe, his partner agent Moskowitz, and Steinberg allegedly had the following conversation:

> Mr. Steinberg said, "Hello," and he immediately asked if we could work something out; again, if we didn't have to take all his help, if we could leave some of his help, just take some of his help. He would vouch for the help that we left behind.

He also stated--he also said the same question that he said to me on March 19: The Lindsay administration was bought and that the Police Department was taken care of because I had asked the question--

A. Yes, your Honor. I asked Mr. Steinberg how he was able to get to the Brew and Burger so quickly after Immigration arrived to conduct an investigation and Mr. Steinberg said to me that he was allowed to park his car outside in front of any of the stores and just put a pass-card in the window that said, Brew Burger supervisor," and the police would pass his car by.

Now, the question that he posed, that he asked me March 19 about the Lindsay administration being bought and the police department being taken care of at that time, when he said the question again in front of my partner, my partner said to him that if he said something like that again he'd arrest him.

Q. Who was your partner?

A. Mr. Moskowitz.

Q. Was there any other conversation during this evening?

A. Mr. Steinberg said to us then what he was really afraid of about Immigration was that his girl friend was here illegally in this country and that if we would do something for her, so that she wouldn't get picked up and sent back to Thailand--I said it is possible that we could give the girl a pass to come into our office at a later date.

Q. What, if anything, did you do?

A. I wrote out a business card for Mr. Steinberg to give to his girl friend, whom I had never met.

Q. What did you put on this card?

A. We put my name on it, Mr. Moskowitz' name or phone number and that she was passed in for a later date. (TR 108 L 4-13, 109 2-25, 110 ?-14)

Agent Volpe then proceeded to explain that this "pass" he had given was common practice in the department, and wholly within regulations. (TR 113, 114, 115, 507)

It is interesting that although a memo was prepared by Volpe about this incident, no mention of the pass is made in this memo. (Def. Riese Ex. A, TR 509)

This memo dated April 9, 1975 (Def. Riese Ex. A) is an important turning point. It is the first time an attempt at bribery is mentioned by anyone. Curiously, the memo is captioned "Attempting to gain immigration benefits by offering a bribe to a service officer". (Def. Riese's Ex. A, TR 510) When questioned about the memo, (which detailed the events of March 31) Volpe, without equovication, admitted that no bribe had been offered, and that he was instructed to use that caption by his supervisor.

Q. Did Mr. Steinberg offer you a bribe on either the 19th of March or the 31st of March? Just yes or no, if you can.

A. No, sir.

Q. Why did you put it on this paper?

A. That is what I was instructed by my supervisor.

Q. It is false, is it not?

A. He is the supervisor.

Q. But it is false to say on this paper that either on March 19 or on March 31 Mr. Steinberg offered you a bribe?

MR. IASON: Objection. There is nothing in here that says that.

THE COURT: Just make your objection. Objection sustained.

Q. Are you telling us that you put that in here only because your supervisor told you to?

A. That is the title he told me to use.

Q. Did you say to him, "Dear Mr. Supervisor, This man didn't offer me a bribe"?

A. He is the supervisor. I said nothing to him.

Q. You just put down what he said?

Do we have it clearly, then, that when this was written you had never received an offer of a bribe from Mr. Steinberg or anybody else connected with this restaurant; right?

A. Yes, sir. (TR 511 L 2-25, 512 L 2-4)

The March 31 conversation was reported to Mr. Coffee, Mr. Rowland, and Assistant District Director of Investigations. Mr. Wagner (TR 117, 118, 119) As a result of the conversation with Mr. Wagner the incident was reported to the FBI (TR 119). Pursuant

to instructions from their supervisors, agents Volpe and Moskowitz returned to Brew Burger on April 29 and attempted to contact Fred Steinberg. A Brew Burger manager, at Volpe's request, reached Fred by phone. Volpe claims to have had the following conversation with Steinberg:

> A. I said to Mr. Steinberg, I told him that we were at 109 East 42 Street. He asked if we'd be going to any other Brew Burgers that evening. He asked me not to and I said I wouldn't, and I said, referring to what we talked about at an earlier meeting, "That is what I'm talking to you about now on the telephone. I'd like to stop in and see you, have a couple of beers like you were saying," and he said, "Fine." (TR 121 L 19-25, 122L 2-21)

This conversation was not recorded. In answer to Volpe's request, Steinberg told Volpe that he could call him at any Brew Burger and the manager would locate him.

Thereafter, and on May 1, 1975, Volpe and Moskowitz met with FBI agent Charles McCormack. (TR 513) It was at this meeting that Volpe and Moskowitz were instructed to seek out Fred Steinberg, and record the conversation. Volpe gave his consent to wear a recording device. Upon cross-examination, Volpe again reitterated that up to this point no one had offered him <u>any sort of bribe</u>. <u>Volpe further stated that his supervisor suggested that if this meeting were set up, someone might offer them a bribe.</u> (TR 522)

Officer Volpe further testified that prior to this anticipated meeting with Steinberg, he received instructions from Assistant United States Attorney Joe Jaffee. (TR 525, 526) This conference took place in Mr. Jaffee's office on or about May 2. (TR 527) Also present at this meeting was Mr. Moskowitz, FBI agent Volpe, and an INS supervisor named Ashe. Volpe stated that Jaffee instructed him to

> "See what he wants to offer you, if it's possible see if he is going to offer you money," and he said, "If anybody brings the mention of green cards, jump on the bandwagon." (TR 530 L 14-16)

Volpe also stated that on the day he was wired, Special Agent McCormack (FBI) instructed him to "play a crooked cop." (TR 586) Volpe again admitted that up to this point no one had made any offers of a bribe to him. (TR 540) Volpe further claims that he advised Assistant United States Attorney Jaffee that other businessmen had had conversations with him which were similar to the March 19 and March 31 conversations. However, no one in the INS, FBI or United States Attorney's office supervisory chain had suggested that these other businessmen be recorded or investigated. (TR 533) Volpe further stated that the reason for the distinction was that the other businessmen had only <u>one</u> store whereas this was a <u>chain</u>. (TR 533)

Pursuant to the instructions given at this conference, Volpe

and Moskowitz went to the Brew Burger located at 32nd Street and Seventh Avenue (TR 124). Agent Volpe wore a tape recording device concealed upon his body. (TR 123)

THE MAY 6 MEETING

The meeting took place at 7:32 P.M. Volpe and his partner arrived at the restaurant and spoke with the manager. The manager then called Fred Steinberg, who advised this employee that he would be right over. He arrived some ten or fifteen minutes later. (TR 124)

At the very beginning of the conversation, Volpe began what was to be a steady stream of implied threats and intimidation. Volpe, who had ordered a beer prior to Steinberg's arrival began the conversation. Steinberg then told them "You know you really blitzed me there for a while" (referring to the steady stream of immigration raids.) (GX la, p.4) It was Volpe (not Steinberg) who first brought up talk about the possibility of favors. In response to Steinberg's statement, Volpe implied that those things can be changed. He says to Steinberg:

> Yeah. Well that's what we are here to talk to you about. See if we can slow that down somehow, you know. (GX la, 4, 267a)

It should be noted that the initiative is clearly Volpe's. Volpe, seeking to coerce Steinberg's cooperation asks about Fred's girl.

JV Your girl's ah, alright, right?

FS Yeah, right, she's okay.

JV I told you that's the way the pass is goin to work, so...

FS She has a weak heart, you know.

JV A weak heart? Or a broken one if she gets sent back.
(GX la, 4 emphasis added, 267a)

Further on in the conversation, Volpe in an attempt to show Fred what can happen to his girl if he's not cooperative talks about the Brooklyn Navy Yard immigration jail and what can happen to a female who is brought over there.

> Over there when you cut somebody loose, the chances of a female getting screwed up over there is very good...
> (GX la, 65, 328a)

During this conversation Fred advised Volpe that they've cleaned up their staff and made green cards mandatory. Dennis Riese who was also present, advised Volpe that they don't want to be breaking any laws. (GX la, 6) They made it very clear to the agents that they wanted everything to be open and above board.

Volpe, attempting to coerce them into offering a bribe, began to weave a scheme through which he could give Riese and Steinberg advance notice of the raids. Volpe pressing the issue said to the defendants:

> Well listen, you said ya know, a couple of times you want to try and get rid of some of the bad guys and you want to rotate your good help out and around. Well that's why I came over, to have a few beers with you, to see if we can work something out about it, because like I said, now I am where I want to be. I am a honcho.[1] There's no problem. (GX la, 9 emphasis added, 322a)

Volpe told the defendants how he'd previously tried to "work something out" with other businessmen in an attempt to convince Riese and Steinberg that he could back up his bragging. (GX la, 10) Fred and Dennis, fearful of the agents' power, began to talk about the labor problems they had; union difficulties, training, etc. Volpe then began to volunteer information to Fred and Dennis, for example telling them that immigration does not "hit" between midnight and 8. (GX la, 13) Fred, advised Volpe that there's no way the restaurants can trick immigration. They can walk into any store any time and find people (referring to illegal aliens). He also told Volpe that he couldn't tell him which stores to go to. Volpe then suggested that they didn't have to go into any of their stores but could hit other chains. (GX la, 16) They began to discuss the problems of their jobs among themselves, and Volpe and Moskowitz then devised a scheme whereby they would advise Fred when they would raid so that Fred or Dennis could juggle their help during the raid. (GX la, 22,23) The two agents continued to suggest methods to the defendants-appellants, of arranging things

* * * *

1 -- Vernacular for someone important.

so they wouldn't lose good help in the INS raids. (GX la, 23, 24) In response to this conversation, and realizing the power these agents had, Steinberg told them they (he and Riese) would not stab them in the back. He stated "you have the power to cripple us if we ever do that to you and we realize that." [2] (GX la, 24) Volpe and Moskowitz continued to outline the procedure whereby they would give Fred and Dennis advance notice of what stores would be hit, giving Fred and Dennis time to switch around employees. Volpe then asked for a list of their stores. "Now you, you've got to give us the list of other places, you know." (GX la, 26)

During this discussion Riese asked Volpe if there was any way he could help him get a green card for a friend. Volpe, following his supervisor's instructions, told him it could be done, that it is all legal and would be put through with the proper papers. (GX la, 29,32,57) [3]

Volpe, pressing hard on the defendants, told them repeatedly that one hand washed the other, (GX la, 49,50) and asked Riese for "something of monetary value" (GX la, 50). Riese, resisting their request for money, said "Look, you, know, umm, there is nothing wrong with Brew Burgers. If I had a friend of mine that I wanted to feed, nobody is going to stop me" (GX la, 51). Volpe

* * * *

2 -- During cross-examination Volpe admitted he wanted to emphasize how much power he had (TR 457)

3 -- Volpe had been told by supervisors to "jump on the bandwagon if anyone brought up green cards. (TR 530)

pressing again for money states that INS people are not supposed to have friends. Fred and Dennis suggested restaurants other than Brew Burger, but Volpe and Moskowitz pushed hard to get Steinberg or Riese to offer a bribe. Riese indicated that he and Fred were very reluctant. (GX la, 57) Realizing that they would not succeed on that score, the conversation turned to a scheme to get green cards for aliens. Riese told them he would not pay for the green cards, and that it wasn't worth it to him to pay. (GX la, 58) Volpe then suggested that:

> So you don't have to give us the money, give it to, you know, somebody else to give it to us, one of the, somebody you can trust, somebody you got, er confidence in, not even him. (GX la, 59, 322a)

Volpe, anxious to be offered a bribe, discussed his financial problems, and both he and Moskowitz then reemphasized to the defendants what damage they could do.

JM	You know, you know, what damage we do when we come in, right?
FS	Yeah
JV	You are going to know what it is worth to you?
JM	Can you put a monetary amount on it? What disruption it causes?
JV	It is up to you guys. (GX la, 63, 326a)

Volpe continued to press on the damage they could do and told Steinberg that it could all be prevented. The meeting ended with Riese giving Volpe the biographical information on his friend, and Volpe giving the defendants one week to think things over.

The cross-examination revealed that Volpe strongly wanted Steinberg to understand that he possessed great power.

> Q. You wanted to make sure that these people knew that all of this was legal, didn't you? You wanted Mr. Steinberg and Mr. Riese to think that everything you were doing was legal, didn't you?
>
> A. Yes, ma'am.
>
> Q. What did you mean when you told him that you were the honcho?
>
> A. I was the supervisor of the evening shift. I was the number one man.
>
> Q. You were the big shot, weren't you?
>
> A. The supervisor, yes.
>
> Q. <u>You wanted Mr. Steinberg to understand that you had power, didn't you</u>?
>
> A. <u>Yes, ma'am</u>.
>
> Q. <u>You wanted to make sure he knew you had power</u>?
>
> A. <u>Yes, ma'am</u>. (TR 457 L 10-25)

Upon cross-examination, Volpe admitted that he and Moskowitz had agreed prior to the meeting that they were going to try to get Steinberg to offer them money (TR 545) and that he, not Steinberg, was the first to request money. (TR 600)

It should be noted that although GX 1a clearly indicates that Volpe and Moskowitz ordered beers, they never offered to pay for them, nor did they call a waiter for the check. (TR 454) [4]

THE MAY 14 MEETING

The agents again went to a Brew Burger, (this time on 52nd Street and Third Avenue) and asked the manager for Fred. Fred was contacted by the manager, and shortly thereafter, arrived on the scene. (TR 153,154) On this occasion it was agent Moskowitz who was wearing a recording device. (TR 154)

This court should note that on each occasion until June 12, (the date of the arrest) contact was made with Fred Steinberg by agents Volpe and Moskowitz seeking him out.

The substance of this meeting was to discuss the proposition set forth by the agents in the May 6th meeting. Fred advised Volpe that this deal was too big for him and he could not handle it.

* * * *

4 -- Volpe and Moskowitz both testified that when out with friends or in a social setting they would never leave without paying for their fare.

Volpe pressed Steinberg and tried to convince him that it was worth it to him. (GX 2a, 5,6) Fred told them the most he could do was give them a meal. (GX 2a,6) Volpe then brought up the green card deal and Fred told Volpe that his girl might be willing to buy one. Volpe then discussed the methods telling Fred they needed sponsors, what kind of people they needed (no one with a criminal record), and how the fingerprints would run and a proper file set up. (GX 2a, 10) Volpe explained that the forms had to be filled out, and the green cards numbered. (GX 2a, 13,15) Fred insisted he did not want to be involved, but Volpe pressed him by telling him it was strictly legitimate. He tried to persuade Fred to be the sponsor, although Fred kept telling him the aliens would have to get their own sponsor.

FS	I'm not involved.
JM	He, he don't want anything. Alright, that's good.
FS	I'll send the people to you. You guys can do whatever you want with them.
JV	Alright. We're gonna have to get somebody to sign these things. Somebody, somewhere along the line is gonna have to sign the labor certs. Because you want to make it legit. That's what I'm saying. This is gonna be strict legit. This isn't gonna be phony or nothing.

FS Yeah.

JM We're doing it and we're playing the angles the way the lawyer would do, but we're playing it cheaper. Same thing a lawyer would do. So.

JV Instead of having the lawyer get the labor cert, your attorney box, there's no name, you did it yourself. That's all, no big deal. (1-second UNINTELL.) But, uh, other than that, we're gonna make it totally legit.

JV Brew and Burger is sponsoring twenty or ten, fifteen, or Brewery is sponsoring five, somebody else is sponsoring. 'Em all on the up and up.

JM Whoever you can sign for yourself, you know what I mean?

JV If we're signing them, and because they're gonna be labor certifications they gotta sign them. Somebody who's going to sponsor them, because when it gets reviewed, they're gonna say "This guy's getting a card and, er.."

FS They'll have to get their own sponsors.

JV Uh.

FS They have to get their own sponsors.

JV For labor certification, they're gonna need a ya know--well, they can ask you guys.

JM	If any of them are managers and such.
JV	A manager can't sign a labor cert for himself, being the manager of the place. See, we need an authorized agent's signature of a worker, not a worker, but one of the honchos in the place where he is gonna be employed.
FS	Uh huh.
JV	See, like I said before, you get a mechanic washing cars. Some guy in a cab company signing for him, that's no good.
FS	Yeah.
JV	If you people really want these people to work for you, there's no problem. (GX 2a, 16 : 345a)

Moskowitz, continuing the fraudulent attempt to convince the defendant that this was all legal, stressed that they were "playing an angle like the lawyer would play an angle". (GX 2a, 19) Volpe continually stressed that all this was strictly legal (GX 2a,20). He explained to Steinberg that he would need the people's passport numbers, full names and date of birth. Fred stated that he did not want to sign the labor certificat ns Volpe had suggested they use. Despite Fred's insistance that he did not want to be involved, Volpe insisted that Fred must be present to sign the forms. (GX 2a, 23)

It was at this point that Fred stated that he knew of people (referring to employees) who were willing to pay $1,000 for a legal green card.

It was also at this meeting that for a brief moment Fred Steinberg left Volpe and Moskowitz. While Steinberg was away from the table, Volpe's conversation with Moskowitz revealed their true purpose:

> I'm trying to angle him. If we can get Dennis to sign we'll have all the people together and we want some of these guys there too. [5] (GX2a,17, 346a)

Upon cross-examination Volpe admitted that virtually everything he told Steinberg was a lie. (TR 554, 558, 559, 565) Volpe further admitted that he told Riese and Steinberg what a labor certification was, and what was needed for one. (TR 578) He also conceded that there was in fact nothing illegal about Steinberg (as an employer) completing these forms.

THE MAY 21 CONVERSATION

Volpe testified he next spoke to Mr. Steinberg on May 21, 1975 when he called him to continue the discussion begun on May 14, 1975. This conversation was initiated when Volpe telephoned Steinberg at the Brew Burger number. Volpe advised Steinberg that his boss was pressing him to return to the Brew

* * * *

5 -- This is the defendant's version of the sound on GX2. The government's version appears as: "I'm trying to angle him. We want all the people together and we want some of these guys there too.

Burger restaurants. He asked Steinberg to give him the store numbers. Volpe told Steinberg he needed two stores. Volpe then told Steinberg that as to the "other operation" (obviously referring to the green cards), he was going to "work it out" on two different forms. Volpe explained that it would be quicker. He then instructed Steinberg that he (Steinberg) would use an I-130 petition for his fiance.[6] Volpe then reassured Steinberg "that's all legal now" (GX 3a 5,6) Upon cross-examination, Volpe admitted that Steinberg did not want to use the I-130 (marriage form) since he was not married to her.

> Q. Do you remember who it was who suggested that Mr. Steinberg fill out the marriage form for his girl friend?
>
> A. No, ma'am.
>
> Q. Do you remember that it was your suggestion?
>
> A. Very possibly.
>
> Q. Isn't it true that Mr. Steinberg wanted to fill out a form for her showing that she was an executive secretary in the company?
>
> A. Yes, ma'am.
>
> Q. He wanted to fill out an employer form, didn't he?
>
> A. Yes, ma'am.

* * * *

6 -- Although the defendant Steinberg was not at that time married to Phanvika, at the time of this trial they were husband and wife.

Q. Didn't he tell you he wasn't married to her?

A. Yes, ma'am.

(TR p.455, lines 2-16)

Q. Do you have any idea?

A. Mr. Steinberg said he was getting married to her.

Q. And he told you he was in the process of a divorce, didn't he?

A. Yes.

Q. And when he told you he wasn't married to her you said, "Don't worry, it doesn't matter."

A. Yes, ma'am.

Q. You kept telling him not to worry?

A. Yes, ma'am.

Q. And you said everything would be okay and it didn't make any difference?

A. Yes, ma'am.

(TR p. 456, lines 2-15)

Volpe then instructed Steinberg that he would call him at 4 P.M. At 3:55 P.M. Volpe again telephoned Steinberg, at which time Steinberg told Volpe to go to the store at 300 East 42 Street. Volpe asked for another store, and Steinberg suggested 401 Seventh Avenue. The conversation concluded with Volpe telling Steinberg that he would get him the forms the following week.

THE MAY 22 MEETING

On May 22, Volpe, Moskowitz and several other agents proceeded to the first store. While some of the INS agents were interviewing employees, Volpe and Moskowitz discussed with Steinberg and Riese the procedures for completing the green card transactions. Volpe again stated that he would drop the forms off the following week. Volpe, already enmeshed in his pattern of lies, told the defendants that the aliens would be able to adjust their status to citizens in three years. (GX 6a,5)

JV	Oh, give them the forms. Let them fill out the forms, and fill them out and get them signed. Ya know, whoever's gonna sign 'em for the labor certs, and then we're done. Alright? 'Cause I'm gonna create regular files, then they'll have authentic green cards and in five years they can adjust to USC's.
JM	If they want to.
JV	Yeah, if they want to in five years.
JM	They don't have to.
FS	That's five years they can work.
JV	They can adjust to a United States citizens.

JM That's about right.

JV See it's not gonna be, where they just have something for show and tell, if they have to go down there to adjust papers and stuff, there's going to be a file on the shelf, and all, they'll be no problem.

(GX 6a, p.5 & 6, 345a,346a)

Shortly after this conference, the FBI, believing that they did not have enough evidence on Dennis Riese, (and in their continued attempt to ensnare the defendants) directed Volpe to get more evidence on Riese. (TR 667-668)

THE MAY 27 MEETING

Volpe again spoke with Steinberg when Volpe placed a telephone call to Steinberg at his place of business on May 27, 1975. At this time Volpe informed Steinberg that he had the necessary forms, and they arranged to meet later that day at the Brew Burger located at Fifty First Street between Fifth and Sixth Avenues. (TR 261, GX 7a)

Pursuant to the telephone conversation, Steinberg met with Volpe and Moskowitz later that day. Another individual, one James Pappas, was with Steinberg when he arrived at the restaurant. It was at this meeting that the conversation turned to guns. Moskowitz then went into detail about the 357 magnum he carries.

JM	A magnum, that's what I'm wearing right now.
FS	You can't see it.
JM	No problem (Inaudible) if I have to use it (Inaudible) do what it's supposed to do. No. question asked, right? A .38 isn't (Inaudible) won't stop.
JP	No
JM	Unless your standing right (Inaudible) maybe I don't have a .38, I have a 357 magnum.
FS	Boy that's a big gun.
Group	Inaudible
JM	I'm wearing it, no problem, maybe a half pound heavier than a .38
JV	I carry one too.

(GX 8a, p.12--13, A 61)

A short time later, Volpe instructed Steinberg as to how the forms were to be filled out. (TR 269) When Volpe began to explain the I-130 (petition for a spouse) Steinberg again protested that he was not married to Phanvika, and in fact he was still married to someone else. At this juncture both Volpe and Moskowitz continued to insist that there was no problem. Both repeatedly told Fred "Don't worry, don't worry", "You're

in the prog- (meaning progress), so you are as good as divorced." (GX 8a, 23)

THE JUNE 3 CONVERSATION

The next contact with Steinberg occurred on June 3, when Volpe again initiated a telephone call to Steinberg at his place of business. Volpe placed that call to ascertain whether the forms had been completed. When Steinberg told Volpe he could not pick them up until "Thursday", Volpe tried to press for the following day. Steinberg, however, resisted this pressure and it was agreed that Volpe would get the forms on Thursday. (GX 9a)

THE JUNE 5 CONVERSATION

On June 5 Volpe again telephoned Steinberg to ask him if he could pick up the forms that day. Steinberg told Volpe they were not finished. The agent told Steinberg that he had to be out of town on business and attempted to push Steinberg to have them ready the same day. Steinberg refused to be pushed, but finally agreed to have them ready the following morning.

THE JUNE 9 MEETING

On June 9, the agents again went to a Brew Burger

establishment, (this time at Park Avenue & East 31 Street), to speak with Steinberg. Steinberg informed the agents that the forms were not ready, as Dennis had yet to sign the labor certifications. During this conversation Steinberg stated to the agents that everything in the labor certifications was truthful. Volpe told him not to worry about it. (GX 11a, 4) The agents examined the photos of the aliens. Volpe suggested that they turn over the cards to the aliens at a hotel. During this conversation Volpe again reassured Steinberg that everything was perfectly proper, the aliens would be able to become citizens, or bring a wife into the country and that there would be no difficulty. (GX 11a, 14)

THE JUNE 10 MEETING

On June 10, the agents again met with Steinberg at the East 31st Street and Park Avenue establishment. At this meeting Steinberg turned over the remaining three forms. Volpe told Steinberg that the green cards would be ready in a day or two. Volpe then advised Steinberg that he would arrange to give the aliens the green cards at the Commodore Hotel on Thursday, beginning at 9 A.M. The schedule allowed one-half hour between each transfer. Volpe advised Steinberg that he

would let him know the hotel room number by 5 P.M. that evening.

Volpe testified that he again spoke to Steinberg later that same day. Volpe contended that on this occasion Steinberg telephoned him. It was important to note that this conversation was the only one after May 6, that was not recorded, and also the only one allegedly placed by Steinberg to the agents. (TR 340, 341) Volpe stated that he told Steinberg the transaction would take place on Thursday at 9 A.M. in room 2147 and Steinberg agreed. (TR 340)

THE JUNE 12 MEETING

Volpe next spoke to Steinberg on June 12 in room 2147 at the Commodore Hotel. It was at this time that Steinberg and Phanvika Tansuttivanich (now Phanvika Steinberg) arrived to receive Phanvika's green card. Pleasantries were exchanged, including a discussion of Agent Moskowitz's upcoming marriage, and finally, the green card was turned over to "Flower" (Phanvika). Immediately after Steinberg and Phanvika left the room, Moskowitz and Volpe engaged in the following conversation:

JV They got ripped off?

JM Yea, I feel like a Judas, though, I hope everything else works smooth...I thought they weren't going to pick it up.
(GX 12a, 9)

Steinberg and Phanvika were immediately arrested.

The next alien to enter was Pirina. Pirina had one question to ask of Volpe, whether he would be able to go back to his country. Volpe told him he could as long as he didn't stay more than one year. Pirina then turned over $1,000 to Volpe and Volpe gave him the card. Moskowitz escorted him to the elevator, whereupon Pirina was arrested. The same procedure was followed for each alien. Several aliens asked whether they would be able to leave the country, or sponsor family members and were told they could. (GX 12a)

Volpe's testimony indicated that the cards given each alien were legal cards, prepared under the authority of Messrs. Wagner and Roland. (TR 363, 364)

TESTIMONY OF EAMON DOLAN

Eamon Dolan, formerly an employee of National Restaurants, Inc. (Brew Burger's parent corporation) was

called to the stand on behalf of the government. He testified that on May 7 Riese had forwarded a letter to him (GX 39). (Dolan was Riese's immediate supervisor.) Riese, in this letter discloses to Dolan that he expected his stores to be hit heavily by immigration officials. He explained that this was due to the fact that he and Steinberg intended to turn down a deal that was offered to them, and that he expected retaliation in the form of heavy raids. On May 10, Dolan met with Riese to discuss the letter. Riese explained to Dolan that he was fearful of the outcome of the meeting he and Steinberg were going to have with the agents. He feared reprisals because they were going to refuse to go along with the agents. (TR 307,308) Dolan instructed Riese to have no further contact with the agents, and instructed him not to keep the appointment for the meeting (TR 308). There was no testimony indicating that Riese discussed this conference with Steinberg.

TESTIMONY OF MOSKOWITZ

Agent Moskowitz was called to the witness stand and his testimony conformed in sum and substance to that of Agent Volpe.

THE ALIENS

Prior to the testimony of Chayanon Vongchan, his sister Naree was called by the government. She testified that Riese had informed her that Fred Steinberg knew someone in the Immigration Service who could get a green card for someone at a cost of $1,000. (TR 823)

Chayanon Vongchan testified that his sister relayed to him her conversation with Riese. (TR 833)

Avinash Vashisht testified that late in 1974 he, Riese and Steinberg discussed the difficulty of being sponsored for labor certification in order to procure permanent residency. (TR 911) He stated that at one point Riese had provided him with a card containing the name of an immigration officer. (GX 14)

Vashisht related a conversation with Riese in March or April of 1975. Riese, according to Vashisht, knew an immigration officer who could provide Vashisht with a green card for $1,000. (TR 924)

Each of the aliens testified that Mr. Steinberg had given them instructions as to when and where they could pick up their green cards. They further testified that Mr. Steinberg

had advised them that these would be legal green cards and that everything was being done legally. The aliens also testified that it was not unusual for them to discuss personal matters with Fred Steinberg. Many of them were, in fact, friendly with Mr. Steinberg.

THE JURY SELECTION

Prior to the commencement of the trial, the court requested that counsel submit written requests for the voir dire. Counsel for defendant Steinberg submitted a series of questions designed to determine the veniremen's fitness to serve as fair and impartial jurors. (A) The trial court chose to ignore these proper and searching questions, and severely limited the voir dire.

The only questions addressed to each individual juror were designed to elicit no more than their occupation, and their spouse's occupation. (A21-55)

THE TAPE RECORDINGS

As each tape recording was offered into evidence by the government, counsel for defendant Steinberg upon the voir dire asked a series of questions designed to elicit the chain of possession of each tape. The answers to these

questions revealed that Volpe had not supervised the recording of the tapes. The FBI had removed the tape from the recording device and he had not seen the individual tapes again until several weeks before the trial.(TR146,147,165,200,201,202, 209,210)

Counsel for Steinberg objected to the introduction into evidence of each of the tapes. Counsel's objection was predicated upon the government's failure to prove a chain of possession. In light of this failure of proof, there was no basis for determining whether the tapes presented in court were, in fact, the tapes removed from the recording device. Further, the court, from the evidence presented could not determine whether the tapes had been tampered with.

THE GOVERNMENT'S SUMMATION

On numerous occasions in his summation the prosecutor intentionally put "facts" to the jury which were not in evidence.

The first instance occurred when Mr. Iason told the jury that Steinberg had to "hire these illegal aliens because it was inexpensive labor, they're the only ones who are willing to work for this amount of money." Counsel for Steinberg objected, and moved that it be stricken as

unsupported by the evidence. The court refused to strike this comment. (TR 1074)

Again Mr. Iason refers to it being easier "to employ the cheap, illegal aliens as help" (TR 1076) and again it was objected to. Mr. Iason in fact knew that these statements were untrue and the aliens in question were paid union wages or supervisory wages. It is interesting to note that Mr. Iason had 6 witnesses who would have divulged their salaries if asked.

Further on in the summation, the prosecutor informed the jury that Steinberg knew about Mr. Dolan's order to Riese to keep away from the INS agents. (TR 1095) Counsel objected, stating that such a statement was unsupported by the evidence. The court merely stated that counsel would be permitted to comment. The prosecutor again referred to this conversation, and in his second reference claims that Steinberg was told by Dolan that all this was illegal. (TR 1123) Counsel again objected and moved for a mistrial. The motion was denied. At the close of the government's summation, Steinberg's counsel renewed her motion for a mistrial on the issue of the reference to Dolan's conference

with Riese. She pointed out to the court that the prosecutor in fact knew as a result of his interviews with the witnesses that Steinberg had never been told about the conversation. Yet he continued to tell the jury that Steinberg knew of Dolan's instructions. Counsel argued that such conduct was a breach of duty on the prosecutor's part and prosecutorial misconduct. The court denied counsel's motion.

The prosecutor in his rebuttal argument told the jury "we know that when Mr. Volpe refers to the Lindsay Administration remark on the tape, there is no denial by Mr. Steinberg." (TR 1218).

The prosecutor attempted to utilize the rebuttal argument to restate his direct summation. (TR 1217-18, 1226) The trial court made no attempt to prevent his doing so and refused to curtail the rebuttal argument.

POINT I

DEFENDANT STEINBERG, HAVING ESTABLISHED BY A FAIR PREPONDERANCE OF THE EVIDENCE THAT HE WAS INDUCED TO COMMIT THE CRIME BY PEOPLE ACTING ON BEHALF OF THE GOVERNMENT, WAS ENTITLED TO A DIRECTED VERDICT OF ACQUITTAL UPON THE DEFENSE OF ENTRAPMENT, SINCE THE GOVERNMENT FAILED TO ESTABLISH BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAD A PREDISPOSITION TO COMMIT THE CRIME

This court, in 1971, established a two prong test for determining whether a defendant should be acquitted upon an entrapment defense. U.S. v. BRAVER, 450 F. 2d 799, (2nd Cir. 1971), cert. den. 405 U.S. 1064.

The BRAVER case requires for the success of an entrapment defense that the defendant first establish by a fair preponderance of the evidence, that the transaction was initiated by the government. Having established this, it is then incumbent upon the government to prove beyond a reasonable doubt, that the defendant was predisposed to commit the crime. In other words, that he had a propensity to commit the crime. Should the government fail to establish this propensity beyond a reasonable

doubt, then the defendant must be acquitted.

Defendant Steinberg submits that it was established by a fair preponderance that the government initiated the transaction. Surely had this not been established, the court would not have permitted the issue of entrapment to go to the jury.

The facts on the case at bar establish that Volpe and Moskowitz, directed by their supervisors, embarked upon a plan to trap Riese and Steinberg into committing a crime. They used lies, pressure, and intimidation tactics. The agents were the first to bring up bribes or offers of money. They offered to give advanced information about raids. They conscientiously sought to make known to the defendants that they had a great deal of power and that they could cause great harm to the stores with this power. The agents insisted that they wanted money from the defendants. When this suggestion was rebuffed by the defendants, the agents insisted that someone else could give them money so that the defendants would not be involved. Clearly the crime was initiated by the government.

It is further submitted by Mr. Steinberg that the government wholly failed to establish his propensity beyond a reasonable doubt.

The only evidence supplied by the government, in an attempt to establish this "propensity", is the testimony of Volpe, alleging that Steinberg stated his company had the Lindsay administration bought. It is interesting to note that although voluminous tape recordings exist, of Steinberg's conversations with Volpe, we never hear this statement from Steinberg's mouth. Only from Volpe. Giving Mr. Volpe the benefit of a doubt, let us for a moment assume that Mr. Steinberg made this statement. (We do not, of course, concede that it was made.) Does this statement say that <u>he</u>, Mr. Steinberg, has bought the Lindsay administration? That he has police on the pad? Not at all! Assuming this was said, the only inference that can be drawn is that the <u>company</u>, not Mr. Steinberg, has bought the cooperation of city officials. Without more, (and nothing further was offered to support the theory of propensity) as a matter of law, propensity was <u>not</u> established beyond a reasonable doubt.

Counsel for the defendant-appellant Steinberg, in a motion pursuant to Rule 29 FRCP sought a directed verdict of acquittal upon this ground. The trial court denied counsel's motion, refusing to hold that as a matter of law, the government had failed to carry their burden of proof. Appellant Steinberg urges upon this court, that the lower court's refusal was grevious error.

POINT II

THE TRIAL COURT'S CHARGE TO THE JURY UPON THE DEFENSE OF ENTRAPMENT WAS NOT IN ACCORD WITH THE RULE OF THIS CIRCUIT THE COURT'S FAILURE TO UTILIZE THE CHARGE APPROVED IN U.S. v. BRAVER, SUPRA, ALTHOUGH REQUESTED BY COUNSEL TO DO SO WAS SERIOUS ERROR

Pursuant to the trial court's request, counsel for all sides submitted written requests to charge on the relevant questions to be submitted to the jury. Prior to the court's charge, the trial judge ruled upon each request individually. Counsel for appellant Steinberg submitted her request no.23.(A63) That request dealt with the issue of the entrapment and appears in the supplemental appendix at page A

Judge Wyatt in colloquy with counsel indicated that he would give a "standard" entrapment charge, and read that charge to counsel.(TR 1049) At the close of the court's charge to the jury, counsel set forth their exceptions. (The court's charge as given, is set forth in the joint appendix at page 211a.)

Appellent Steinberg respectfully submits that the court's charge was improper and failed to comply with the standard set by this court in U.S. v. BRAVER, supra.

POINT III

THE CONDUCT OF THE AGENTS IN THE CASE AT BAR WAS SO OUTRAGEOUS AS TO RESULT IN THE DEPRIVATION OF DEFENDANT STEINBERG'S RIGHT TO DUE PROCESS OF LAW

The case at bar involves a complicated scheme contrived by two agents of the Immigration and Naturalization Department, and encouraged by the FBI and the United States Attorney's Office for the Southern District of New York, to create a situation where INS agents would "assume the role of a potential consumer of corruption" U.S. v. ARCHER, 486 F.2d 670, 672 (1973). Such conduct has been held by this court to be deplorable, improper, and contrary to law. U.S. v. ARCHER, supra.

In ARCHER, this court speaking through Judge Friendly, indicated its clear intention to follow the dissent of Mr. Justice Brandeis in OLMSTEAD v. U.S. 277 U.S. 435, 485, 48 S.Ct. 564, 575 (1928). Judge Friendly asserted that the

> Existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face. U.S. v. ARCHER, supra, p.675 (Emphasis added)

The ARCHER case involved a scheme where federal agents set about to ensnare members of the New York City Criminal Justice System. To accomplish this end, government agents wove a web of lies which ultimately brought about the payment of a bribe to a Queens County Assistant District Attorney. Although ARCHER was decided upon other grounds, this Court stated that were a decision to be required on this issue;

> Our intuition inclines us to the belief that this case would call for application of Mr. Justice Brandeis' observation in Olmstead. Even though that view has not been incorporated in the entrapment defense, there is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.
>
> U.S. v. ARCHER, Supra, 676, 677

In characterizing this type of reprehensible conduct on the part of the government, Judge Friendly stated:

> While this pattern of deception may be less serious than some forms of governmental participation in crime that can be hypothesized, it is substantially more offensive than the common cases where government agents induce the sale of narcotics in order to make drug arrests.
>
> Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part.
>
> U.S. v. ARCHER, Supra 677

It is apparent from the government's conduct in the case at bar that the lesson the court sought to teach, was not learned by the United States Attorney for the Southern District of New York. (The same office involved in ARCHER) For in Mr. Steinberg's case, the same office, working through Assistant United States Attorney Jaffee engaged in the very same outrageous conduct. Mr. Volpe an agent of the United States Government, testified that he was instructed by his supervisors to get evidence on Riese, (TR) and jump on the bandwagon

if green cards are mentioned. (TR 530) The government, in its case in chief established through Volpe, that the agents were to play the role of corrupt cops, (TR586) the very type of action attacked and deplored by the Second Circuit in ARCHER.

Mr. Justice Holmes, in his dissent in OLMSTEAD, supra, sought to prevent government agents from utilizing this type of conduct.

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way...We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.
>
> OLMSTEAD v. U.S., Supra at 470, Emphasis added.

Agents Volpe and Moskowitz admitted throughout their testimony that everything they told Steinberg and Riese was false. In Volpe's own words "Just another lie." (TR) Such conduct has long been held to be "shocking to our sense of justice." U.S. v. McGRATH, 468 F.2d 1027,1030. (7th Cir.1972) In U.S. v. ALBERANGA-SALAZAR, 360 F. Supp. 1221 (1973) (a case decided after U.S. v. RUSSELL, 411 U.S. 423, 93 S.Ct. 1637,(1973)) The court refused to permit prosecution of an alien pursuant to 18 U.S.C. 911 (falsely representing oneself as a citizen) upon the ground that the alleged false statements by the defendant were induced by false statements of the government agents. Judge Ferguson, following Judge Friendly's path stated:

> It is true that (1) the agent committed no crime; (2) no invasion of defendant's constitutional rights occurred; and (3) there is no statute or rule of procedure to prohibit the government from lying. The issue is whether the federal courts may permit a

conviction to be obtained in the manner described here.

> If Justice Brandeis' words in his dissent in OLMSTEAD v. U.S. 277 U.S.438,485,48 S.Ct. 564,575,72 L.Ed.944 (1918), that "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands of the citizen" have any vitality today, then the court must hold that when a government lie induces a lie, the latter may not be prosecutable in a federal district court. A court which determines that prosecution for such a lie will not be countenanced is not conducting "a 'chancellor's foot' veto over law enforcement practices of which it did not approve", UNITED STATES v. RUSSELL, supra 411 at 435, 93 S.Ct. at 1644,but rather is exercising its constitutional prerogative mandated by Article III of our Constitution. Cf. MESAROSH v. UNITED STATES,352 U.S. 1,77 S.Ct.1, 1 L.Ed.2d 1 (1956);McNABB v. UNITED STATES, 318 U.S.332,63 S.Ct.608,87 L.Ed. 819 (1943).
>
> For the reasons indicated above, the motion to suppress the statement made by the defendant that he was a citizen is granted.
>
> U.S.v.ALBERANGA-SALAZAR,Supra,p.1223,Emph.Added

Recently, the Arizona Court of Appeals has said,

> "that the issue in an entrapment case is not whether the officer's conduct would have induced a reasonable man to commit a crime, but whether it in fact induced the defendant to commit the crime contrary to his normal inclinations. STATE v. KISER,Ariz.Ct.of App 19 CLR 2043, March 5, 1976.

In the case at bar, it is clear that the officer's conduct induced these defendants to engage in the scheme. The trial record is filled with illustrations of Steinberg and Riese's reluctance to become involved. But two examples of this are Volpe's suggestion that since Steinberg and Riese would not give them money, they could have some one else give it to them, and Volpe's insistance that Steinberg use the marriage petition when Steinberg clearly informed Volpe he didn't want to lie. ( ) Surely Volpe's and Moskowitz's constant assurances to the defendants that everything was legal was conduct which induced these defendants to become involved "contrary to their normal inclinations."

Appellant Steinberg submits, that although this court in ARCHER did not resolve the difficult question alluded to by Judge Friendly, the lesson sought to be taught was not learned. The case at bar clearly presents this court with a factual basis upon which to reassert as its holding, the dictum laid down in ARCHER. The appellant Steinberg urges this court to reaffirm Judge Friendly's position in the case at bar.

POINT IV

THE RULE OF LAW, THAT A DEFENDANT WHO IS INDUCED AND COUNSELED INTO THE COMMISSION OF A CRIMINAL ACT, BY THE WORDS AND ACTS OF GOVERNMENT AGENTS AND WHO HAS NO PREDISPOSITION TO COMMIT THE ACT HAS NOT BEEN CHANGED BY THE RULINGS IN U.S. v. RUSSELL, SUPRA, AND HAMPTON v. U.S.,96 S.Ct.1646 (1976)

The United States Supreme Court, in its recent decision in U.S. v. RUSSELL, supra, dealt with a very limited set of circumstances. That case involved government participation in the manufacture and sale of methamphetamine. The government agents, in RUSSELL, supplied an ingredient essential for the manufacture of the drug. What clearly distinguishes this case from the case at bar, is that the defendant in RUSSELL, admitted his predisposition to commit the crime. Thus, the court properly held:

> Respondent's concession in the Court of Appeals that the jury finding as to predisposition was supported by the evidence is, therefore, fatal to his claim of entrapment. He was an active participant in an illegal drug manufacturing enterprise which began before the Government agent appeared on the scene, and continued after the Government agent had left the scene. He was, in the words of Sherman, supra, not an "unwary innocent" but an "unwary criminal." The Court of Appeals was wrong, we believe when it sought to broaden the principle laid down in Sorrells and Sherman. Its judgment is therefore reversed. U.S.v.RUSSELL,supra,93 S.Ct. 1637, p.1645 (Emphasis added)

A further distinction is drawn from the fact that in RUSSELL the illegal acts began before the government agents appearance on the scene, and continued after they left. In the case at bar, no illegal conduct took place until the third meeting between Steinberg and the agents, and such co duct occurred as a direct result of the lies and solicitation of the agents.

It should be noted that Mr. Justice Rehnquist, in writing the court's opinion in RUSSELL, himself imposes a limitation upon the use of the RUSSELL holding. He stated that in drug related crimes, "infiltration of drug rings and a limited

participation in their unlawful present practices" is acceptable. He suggests that such conduct is "the only practicable means of detection." Supra, 93 S.Ct. at 1643.

It should be further noted that Mr. Justice Rehnquist provides his own escape clause, indicating that if presented with the proper situation, the court would not follow its RUSSELL holding. The court may:

> Some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.183(1952)
> U.S. v. RUSSELL, supra, 93. S.Ct. at 1643.

HAMPTON v. U.S., 96 S.Ct., 1646 (1976), another narcotics case, reaffirms the RUSSELL proposition that a conviction may stand in a case where the contraband sold was procured from a government agent or informer. The court was badly split in its decision. Mr. Justice Rehnquist announcing the judgment is joined in his opinion by Mr. Chief Justice Burger, and Mr. Justice White. Mr. Justice Powell, concurring is joined by Mr. Justice Blackmun. Mr. Justice Brennan, writing for the dissent, is joined by Mr. Justice Stewart and Mr. Justice Marshall.

Factually the HAMPTON case arose when HAMPTON sold heroin to agents of the Federal Government. The sales were arranged by an informant. HAMPTON's defense revolved around his assertion that he did not intend to sell heroin, that it was supplied by the informant and that he intended to sell a non-narcotic counterfeit drug. Mr. Justice Rehnquist here followed his holding in RUSSELL, supra.

The key to HAMPTON's relevance to the case at bar is found not in Mr. Justice Rehnquist's opinion, but rather in Mr. Justice Powell's concurring opinion, and Mr. Justice Brennan's dissent. From these two opinions we

are shown that five out of nine justices would rule in favor of overturning a conviction such as the one at bar.

The tenor of Justice Powell's opinion would lead one to conclude that given facts similar to U.S. v. ARCHER, supra, both he and Justice Blackmun would follow the Second Circuit's lead.

> The plurality thus says that the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances.
>
> I do not understand RUSSELL or earlier cases delineating the predisposition-focused defense of entrapment to have gone so far, and there was no need for them to do so. In those cases the Court was confronted with specific claims of police "over-involvement" in criminal activity involving contraband. Disposition of those claims did not require the Court to consider whether overinvolvement of government agents in contraband offenses could ever reach such proportions as to bar conviction of a predisposed defendant as a matter of due process. Nor have we had occasion yet to confront Government over-involvement in areas outside the realm of contraband offenses. Cf. UNITED STATES v. ARCHER, 486 F.2d 670 (CA2 1973). In these circumstances, I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles.
>
> The plurality's use of the "chancellor's foot" passage from RUSSELL, ante, at 1649 may suggest that it also would foreclose reliance on our supervisory power to bar conviction of a predisposed defendant because of outrageous police conduct. Again I do not understand RUSSELL to have gone so far. HAMPTON v. U.S., Supra, at 1651. (Emphasis added)

A reading of Justice Brennan's dissent leads to the same conclusion.

> Whether the differences from the RUSSELL situation are of degree or of kind, ante ... (REHNQUIST,J.), I think they clearly require a different result. Where the Government's agent deliberately sets up the accused by supplying him with contraband and then bringing him to another agent as a

potential purchaser, the Government's role has passed the point of toleration. UNITED STATES v. WEST, 511 F.2d 1083 (CA3 1975). The Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary. UNITED STATES v. BUENO, 447 F.2d 903,905 (CA5 1971). There is little, if any, law enforcement interest promoted by such conduct; plainly it is not designed to discover ongoing drug traffic. Rather, such conduct deliberately entices an individual to commit a crime. That the accused is "predisposed" cannot possibly justify the action of government officials in purposefully creating the crime. No one would suggest that the police could round up and jail all "predisposed" individuals, yet that is precisely what set-ups like the instant one are intended to accomplish. Cf. UNITED STATES v. RUSSELL, supra,... at 443-444 (STEWART, J., dissenting). Thus, this case is nothing less than an instance of "the Government...seeking to punish for an alleged offense which is the product of the creative activity of its own officials." SORRELLS v. UNITED STATES, supra ...

These considerations persuaded the Court of Appeals for the Fifth Circuit to hold that where the Government has provided the contraband that the defendant is convicted of selling, there is entrapment as a matter of law. UNITED STATES v. BUENO, supra. That court has also concluded that this holding was not affected by RUSSELL. See, e.g., United States v. Oquendo, 490 F.2d 161 (1974); United States v. Mosley, 496 F.2d 1012 (1974). The Court of Appeals for the Third Circuit agreed, and followed Bueno after RUSSELL was decided. United States v. West, supra. Even if these courts erred in holding that RUSSELL did not foreclose the finding of "entrapment" as a matter of law in Bueno, see ante, at 2 n. 2 (POWELL,J.), I agree with my Brother POWELL that "entrapment" under the "subjective"approach is only one possible defense--he suggests due process or appeal to our supervisory power as alternatives--in cases where the Government's conduct is as egregious as in this case. Id., at 3-5 (POWELL, J.). Petitioner makes no claim to the benefit of an entrapment defense that focuses on predisposition. Ante, at 5 (REHNQUIST, J.). For the reasons stated I would at a minimum engraft the Bueno principle upon that defense and hold that conviction is barred as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by a Government agent. Cf. Olmstead v. United States, 277 U.S. 438,470 (1928) (Holmes, J., dissenting); Casey v. United States, 276 U.S. 413, 423-425 (1928) (Brandeis,J., dissenting).

1654, 1655

It is essential to recognize, in reviewing RUSSELL and HAMPTON, as they relate to the case at bar, that each deals with a defendant who was admittedly predisposed to commit the crime. The trial of the instant case wholly failed to establish beyond a reasonable doubt that either Fred Steinberg or Dennis Riese had any predisposition to commit the alleged crimes. Thus, even Mr. Justice Rehnquist would in all likelihood vote to overturn this conviction. Both his decisions indicate that the defense of entrapment is viable on pre RUSSELL standards, where predisposition is not established.

Clearly, in the case at bar we find government "over involvement" in this so-called "white collar" crime. Agent Volpe's deliberate lies, and his strong pressure on the defendants formed an unbeatable team. Volpe himself conceded that it was his purpose and design to make Steinberg and Riese feel his power, so that they could understand the damage they would sustain if they failed to cooperate (TR 457). If this is not outrageous conduct on the part of our government agents, is anything? In this day of exceedingly high crime rates and low respect for law, can we expect our citizens to respect a government that takes part in and utilizes the very crimes which it condemns and outlaws. Such a double standard is unacceptable. It is incumbent upon this court to reaffirm its long standing position of abhorrence of such conduct and the double standard which flows from it.

POINT V

THE GOVERNMENT'S FAILURE TO PROVE THE CHAIN OF POSSESSION OF THE TAPE RECORDINGS WAS FATAL, AND IT WAS ERROR FOR THEM TO HAVE BEEN ADMITTED INTO EVIDENCE WITHOUT SUCH PROOF

It is well established that when a government agent makes a tape recording which will ultimately be used in evidence, and said recording is authorized pursuant to 18 U.S.C. 2510-2520, the government must establish at trial that the tapes were properly sealed. The government must further prove the chain of possession. 18 U.S.C. 2518. The statute was designed to remedy the gap pointed out by the Supreme Court in BERGER v. NEW YORK, 388 U.S. 41 (1967). The Court in BERGER held that the statute as it then stood was without adequate judicial supervision or protective procedures.

One of the prime objectives in enacting 18 U.S.C. 2518 8(A) was to prevent tampering with the tape from the time of the creation, until their admission into evidence.

Although this statute relates only to court authorized wiretaps and electronic surveillance, surely the same principle must be applied to tapes made without prior authorization.

Recently the New York Court of Appeals adopted the proposition that the sealing requirements regarding electronic surveillance must be strictly observed. PEOPLE v. NICOLLETTI, 34 N.Y. 2d 249 (1974). This Court in U.S. v. MARION, F 2d , Slip Op. 794, Doc. 75-1408, (2nd Cir. May 7, 1976) strongly reaffirmed this position stating that

> To ignore or gloss over these restrictions, or view them as mere technicalities to be read in such a fasion as to render them nugatory, then is to place in peril our cherished personal liberties.
> P. 3584, Slip Op.

Agent Volpe was asked a series of questions as each tape recording was offered into evidence. (TR 146, et seq.)

Volpe's answers revealed that the FBI had supervised the recording of the conversations, and that he, Volpe had not seen the tapes from the time they were removed from the body recorder until he began to prepare for trial, one year later. He further, was unable to say who had custody of the tapes during that period, nor did he have personal knowledge as to where they were stored. The government failed to produce any other witness to testify to the chain of possession.

It is clear that if these tapes had been recordings of conversations authorized under 18 U.S.C. 2510-2520, they would not be admissible in evidence for failure to comply with the sealing provisions. The fact that they were not so authorized should not change the result.

In the case at bar, it was impossible to determine who had possession of the tapes for a period of one year prior to the trial. There was absolutely no way of determining whether they had been tampered with. Surely the protective procedures suggested by the Court in BERGER v. NEW YORK, supra, are at least equally important where there is no judicial supervision whatsoever.

POINT VI

THE PROSECUTOR'S SUMMATION WAS WHOLLY IMPROPER, AS WAS HIS REBUTTAL. THE CONDUCT OF THE PROSECUTOR IN THIS REGARD DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW

It has long been said that the duty not to "derogate from a fair and impartial criminal procedure rests, in the first instance upon the shoulders of the prosecutor." U.S. v. SMITH, 500 F 2d 293 (6th Cir., 1974). It follows that in the second instance, the Court must supervise and correct improprieties so that a criminal defendant receives a fair trial.

In the case at bar, the prosecutor throughout his summation insisted on referring to matters not in evidence, and the trial court wholly failed to restrict these references. The government sought to make a point of the Riese-Dolan conference, (TR301) insisting that "Mr. Steinberg and Mr. Riese are told it is illegal. They are told by Mr. Dolan." (TR 1125) And earlier in his summation, counsel states "So now Mr. Steinberg knows about this. Steinberg with Dolan---" (TR 1095) In both instances counsel made timely objections. A careful perusal of the record reveals that although Dolan and Riese conferred, no testimony exists to establish, (or support an inference) that Steinberg was aware of the conference or Dolan's instructions to Riese. Even after these objections are raised and counsel realized that there was no support for this argument, he persisted. He argued to the jury, "As a matter of fact, Mr. Dolan, their boss, tells them not to do it." (TR 1123 emphasis added) Counsel again objected and renewed her motion for a mistrial.

The government's conduct continued when in summation counsel argued that Mr. Steinberg requested the "marriage form" for use with Phanvika's application. (TR 1113) The prosecutor well knew that it was Volpe who suggested the use of

the form (by Volpe's own admission, at page 473) and the argument as given was designed to mislead the jury. Counsel for Steinberg at this juncture again moved for a mistrial.

In 1935, Mr. Justice Sutherland set forth a standard by which a prosecutor should guide himself in arguing the government's case. He said:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. BERGER v. UNITED STATES, 295 U.S. 77, 88; 55 S.Ct.629, 79 L.Ed. 1314 (1935) (emphasis added) See also U.S. v. KRAVITZ, 281 F.2d 581, (3rd Cir.,1960) cert. den. 364 U.S. 941;81 S.Ct.459(1961)

Many courts have held that reversal is not mandated unless the improprieties are not "neutralized" by the trial court. U.S. v. SOMERS, 496 F.2d 723 (3rd Cir. 1974). In the case at bar, the trial court wholly failed to neutralize the effect of the prosecutor's misstatements. In fact the trial court's simplistic approach was to merely state that "I will permit you to make that argument when your time comes." (TR 1095) "You have made your point, Mrs. Barlow, and you can refer to it again in your summation." (TR 1114)

In his rebuttal argument, Mr. Iason, referring to Volpe's allegation that Steinberg stated the Lindsay administration had been bought, stated "We know that when Mr. Volpe refers to the Lindsay administration remark on the tape, there is no denial by Mr. Steinberg." (TR 1218) Although counsel's objection was sustained, no limiting instruction was given to the jury, and the damage had already been done.

It is an elementary principle of criminal law, that a prosecutor may not comment on a defendant's failure to produce evidence, or testify in his own defense. Such comments have been held to be a violation of the defendant's rights under the 5th and 14th amendments to the Constitution of the United States. GRIFFIN v. CALIFORNIA, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106; CHAPMAN v. CALIFORNIA, 386 U.S. 18, 87 S. Ct.824, 17 L.Ed.2d 705. The prosecutor's comment to the jury that Mr. Steinberg did not deny the comment is tandamount to a statement that he did not take the witness stand. Such a comment is gross misconduct.

The combination of the government's improper argument which was wholly outside the record, and the failure of the court to neutralize this by any limiting instruction is fatal to the government's case.

Further evidence of the government's studious attempt to use the closing argument in a wholly improper fashion appears in the rebuttal summation. It is clear that when the government utilizes its right to a rebuttal argument, it must be just that. The purpose of rebuttal is to refute arguments made by defense counsel during closing arguments. In the case at bar, the prosecutor, rather than refuting counsel's arguments, sought to utilize rebuttal to repeat in toto his direct closing argument. He attempted to repeat almost verbatum his primary closing argument. (TR 1217-18) Counsel's objection (TR 1226) was neither sustained nor overruled. The court merely stated that "...it is very difficult for me to umpire rebuttal..." The court then instructed the prosecutor that rebuttal is designed to answer arguments advanced in the defendant's closing argument. (TR 1227) Such an admonition, however, did little to change the

prosecutor's plan for his rebuttal. He continued to restate his direct summation. Counsel again objected, but was overruled. (TR 1229)

It is clear that the entire tenor of the prosecutor's direct and rebuttal summation violated the spirit and letter of the law as expressed so elloquently by Mr. Justice Sutherland in BERGER v. U.S., supra.

POINT VII

THE TRIAL COURT'S FAILURE TO EMPLOY COUNSEL'S REQUESTS IN THE VOIR DIRE, AND ITS USE OF ONLY TWO QUESTIONS POSED TO EACH VENIREMAN VIOLATED THE SPIRIT OF RULE 24 FRCP, AND DEPRIVED THE DEFENDANT OF DUE PROCESS OF LAW AND A FAIR TRIAL

The only questions put to individual veniremen in the voir dire at trial requested the potential juror to disclose his or her employment and his or her spouse's employment. Each potential juror was then asked "Do you know of any reason why you couldn't sit here as fair jurors?" (A 18,19,23,35,37,38,40,43,46,47,48,50,51,55)

The jurors were not asked where they resided, whether they had children, whether their children were employed, (in what field if they are employed). Counsel for the defendants were forced to decide whether a juror would be fair based upon less than a name, rank and serial number type of questioning. Under these circumstances, a fair trial could not possibly be had.

It has long been recognized that "a fair trial in a fair tribunal is a basic requirement of due process". In Re MURCHISON, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed.942. In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent", jurors. IRVING v. DOWD, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 75.

In order to insure the selection of a fair and impartial jury with ease and speed, Congress enacted Rule 24(a) of the Federal Rules of Criminal Procedure. It reads in pertinent part as follows:

> (a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

The Rule permits parties to propound themselves, or submit to the court, questions designed to assist them in exercising their challenges in an intelligent manner. The trial judge has, however, been granted fairly broad discretion as to the questions to be put to the prospective jurors. HAM v. SOUTH CAROLINA, 409 U.S. 524, 93 S.Ct.848,35 L.Ed.2d 46 (1973). There are, however, certain principles which should guide a court before preventing counsel from posing questions, (or before it determines that questions submitted in writing ought not be asked). Thus, the trial court's exercise of discretion is "subject to the essential demands of fairness."

> A defendant has "(t)he right to examine jurors on the voir dire as to the existence of a disqualifying state of mind."
>
> The trial court, while impaneling a jury, "has a serious duty to determine the question of actual bias * * *"
>
> "The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories (peremptory challenges) * * *"
>
> A defendant "is entitled to be tried by an unprejudiced and legally qualified jury", and "(t)he range of inquiry in the endeavor to impanel such a jury should be liberal * * *"
>
> A defendant has the right "to probe for the hidden prejudices of the jurors." UNITED STATES v. NAPOLEONE, 349 F.2d 350,353 (3d Cir. 1965) (footnotes omitted).
>
> U.S. v. WOONTON, 518 F.2d 943, 945 (3rd Cir, 1975)

Appellate Courts are loath to disturb a trial court's discretion unless the record reflects that the voir dire as conducted is inadequate to test the competency of the veniremen. SPEAK v. U.S., 161 F.2d 562 (10th Cir,) Recently, however, the Eighth Circuit reversed a conviction where the trial court's inquiries were of a general nature. U.S. v. BEAR RUNNER, 502 F.2d 908 (8th Cir. 1974). In doing so the court observed that:

> The use of general questions such as that employed by the court here was recently looked upon with disapproval by the Supreme Court of Arkansas in Cochran v. State, 505 S.W.2d 520 (Ark.1974) where that court observed:
>
> "...All trial lawyers, and all students of the science of jurisprudence, know that general questions directed to the jury panel, or to individual jurors, by a judge who at the beginning of the trial has no special information regarding the issues, or the relationship of the parties, or the attending circumstances, sometimes fail to elicit answers which may cause even the most conscientious juror to reveal an existing prejudicial status."
>
> Id. at 521.
>
> With this view, we agree.
>
> It is fundamental that any erosion of the right to extensively examine veniremen in order to secure a fair and impartial jury constitutes prejudicial error. The right, although firm and absolute, must always be considered in light of all the surrounding circumstances presented by the particular case. We conclude that fundamental fairness in the present case requires that a new trial be granted.
> Supra, 913. (Emphasis added)

The Sixth Circuit when faced with a situation where counsel had carefully prepared voir dire questions which were not asked by the court, reversed the conviction. MARSON v. U.S. 203 F.2d 904 (6th Cir.1953). The court in MARSON stated that it was error for the court not to have asked the questions prepared by counsel, and which counsel would have asked the jurors had they been permitted to do so.

In the case at bar, none but the most general questions were asked these veniremen. This was a complicated case involving the use of undercover agents. Counsel requested that the Court ask questions relating to this situation.

The trial court failed to pose any questions designed to elicit the juror's feelings about the use of undercover agents, or the use of recording devices, and in light of the vagueness of the voir dire as a whole, the defendant was denied a fair trial.

CONCLUSION

Appellant Steinberg contends that the government wholly failed to establish any propensity on his part to commit the crimes charged. He further contends that he established to the satisfaction of the trial court that he was induced to commit the crime by government agents, by a fair preponderance of the evidence. Thus, he is entitled to a directed verdict of acquittal. He further contends that the conduct of the agents was outrageous in that their lies and implied threats induced the defendant Steinberg, contrary to his normal inclinations, to commit the alleged offense. This conduct deprived the defendant of due process of law. Thus, even if the standard entrapment defense were not applicable the defendant would be entitled to a directed verdict on due process considerations.

Appellant Steinberg further contends that the errors of the court as to admissibility of the tape recordings, and the charge to the jury upon the law of entrapment caused the defendant to be denied a fair trial. Further, the conduct of the prosecutor caused the defendant to be deprived a fair trial.

The appellant Steinberg requests that this court set aside the jury finding and direct a verdict of acquittal upon two grounds. First: That he was entrapped into the commission of an act which he was not normally inclined to commit by the acts of government agents. Second: That the conduct of the agents deprived him of due process of law. Third: That the conduct of the prosecutor in his summation and rebuttal was so improper as to deprive him of due process of law.

Should this court, however, conclude that appellant Steinberg is not entitled to a directed verdict of acquittal, then appellant requests that this court set aside the verdict and order a new trial upon the ground that the court commit a grievous error in impliedly refusing to properly question the veniremen so that a fair jury could be selected and that the court's charge on the law of entrapment was wholly improper and constituted grievous error.

Dated: September 15, 1976
New York, N. Y.

Respectfully submitted,
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233 Broadway
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233-0570

JOYCE KRUTICK BARLOW,
Of Counsel

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF New York } SS.:

JOYCE KRUTICK BARLOW

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Livingston, N.J.
That on the 15 day of September 1976
at No. One St. Andrews Plaza
deponent served the within BRIEF & APPENDIX
upon Robert B. Fiske, Jr.
the UNITED STATES ATTORNEY herein.
by delivering a true copy thereof to him personally.
to the Clerk authorized to accept same.
Deponent knew the person mentioned and described in said papers as the
son therein.

Joyce Krutick Barlow
JOYCE KRUTICK BARLOW

Sworn to before me,
this 15 day of Sept 1976

Notary Public, New York
Qualified in Kings County
Commission Expires March 30, 1977

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF New York } SS.:

JOYCE KRUTICK BARLOW

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at Livingston, N.J.
That on the 15 day of Sept. 1976
deponent served the within BRIEF & APPENDIX
upon Shea Gould Climenko & Casey, Esqs.
attorney(s) for Appellant Riese
in this action, at 330 Madison Avenue
New York, New York
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in – a post office – official depository under the exclusive care and custody of the United States post office department within New York State.

Joyce Krutick Barlow
JOYCE KRUTICK BARLOW

Sworn to before me,
this 15 day of Sept. 1976

Notary Public, New York
Qualified in Kings County
Commission Expires March 30, 1977